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PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 116

THE UNITED STATES, PETITIONER

vs.

FELT & TARRANT MFG. CO.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 14, 1930.
CERTIORARI GRANTED JUNE 2, 1930.

(45)

PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 896

THE UNITED STATES, PETITIONER,

vs.

FELT & TARRANT MFG. CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

FILED MAY 14, 1930

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1 In the Supreme Court of the United States

October term, 1929. No. 896

THE UNITED STATES, PETITIONER

v.

FELT & TARRANT MFG. CO.

Petition for a writ of certiorari to the United States Court of Claims

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the Court of Claims in the above case rendered February 17, 1930, and reported in 37 F. (2d) 977.

2 Statutes and regulations involved

Section 210 of the revenue act of 1917, c. 63, 40 Stat. 300, 307, provides:

"SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

"For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used."

3 Section 1318 of the revenue act of 1921, c. 136, 42 Stat. 227, 314, provides in part:

"Sec. 1318. That section 3226 of the Revised Statutes is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected,

until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof * * *."

Article 1036, Treasury Regulations 62, promulgated under the revenue act of 1921, provides:

"Claims for refund of taxes erroneously collected.—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath."

Statement

The respondent contends, and the United States concedes, that the respondent was entitled to a deduction from gross income for the year 1917 on account of exhaustion of patents. Had this
4 deduction been made, the respondent's tax for 1917 would have been reduced in the sum of $26,909.50. The United States agrees that the respondent would be entitled to judgment for this amount with interest, had the respondent filed a sufficient claim for refund, as required by section 1318 of the revenue act of 1921, supra, and article 1036 of Treasury Regulations 62, supra.

On February 29, 1924, the respondent filed its claim for refund without making any reference to any claim because of exhaustion of patents. The reasons on which the claim for refund was based were stated as follows (Finding 6; Schedule A):

"The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess-profits tax assessed for this period.

"This claim is filed to protect all possible legal rights of the taxpayer, pending, and at the date of, the settlement of the claim for relief. Computation has been made as follows:

Total profits taxes paid	$227,789.38
Less: Decrease in income taxes on account of profits taxes credit	13,667.37
Refund claimed	$214,122.01

"The taxpayer requests an oral hearing and the right of appeal in the event of an adverse decision on the part of the unit, and before any formal rejection of the claim is made."

Under this claim the respondent filed a brief and had a hearing in the office of the Commissioner of Internal Revenue. The sole
5 contention presented in this brief and at the hearing was that the respondent was entitled to assessment under section 210 of the revenue act of 1917. At no time during the course of the proceedings under this claim for refund was any question raised by respondent relative to depreciation of patents or adjustment of value of patents for invested capital purposes. (Finding 6.) At the time of these proceedings it was the regular practice of the commissioner to reject any claim for depletion of patents which had not been made

in the original return. It may have been for this reason that the respondent did not include in its claim for refund a claim based on this specific ground.

On December 17, 1924, the commissioner notified respondent that under the provisions of section 210 of the revenue act of 1917 supra, respondent had been overassessed, and allowed the claim for refund in the amount thus found overassessed and rejected it as to the balance. (Finding 7.)

In January, 1925, the Board of Tax Appeals, in Appeal of Union Metal Manufacturing Co., 1 B. T. A. 395, decided that a taxpayer who had made a specific claim for refund was entitled to a deduction on account of exhaustion of patents, notwithstanding the fact that no such claim had been made in the original return. Thereupon the bureau announced that it acquisced in that decision. (IV–1 Internal Revenue Cum. Bull., p. 3.)

6 In due course the respondent brought this suit in the Court of Claims and for the first time claimed a deduction on account of exhaustion of patents. The Court of Claims awarded it judgment for $26,909.50 with interest.

Questions presented

1. Whether the Comissioner of Internal Revenue, by failing to object to the insufficiency of the respondent's claim for refund, and by acting on the claim so far as it was specific, waived objection to the insufficiency of the claim as to matters not specifically mentioned.

2. Whether the respondent's failure to file a specific claim for refund on the ground of exhaustion of patents was excused because at the time it was known that such a claim would be rejected by the commissioner.

3. Whether, if there was no waiver, and if the failure to file a specific claim for refund was not excused, the taxpayer is entitled to recover on a ground not set forth in its claim for refund.

7 ## Assignments of error

1. The Court of Claims erred in holding that the respondent should be allowed a deduction for exhaustion of patents in spite of its failure to file a specific claim for such a deduction.

2. The Court of Claims erred in giving judgment for the respondent.

Reasons for granting the writ

1. Error was committed by the Court of Claims in concluding from the facts found that the commissioner waived any insufficiency of the respondent's claim for refund under section 1318 of the revenue act of 1921, supra, and article 1036 of Treasury Regulations 62, supra.

The claim for refund was two-fold—specific in seeking special assessment under section 210 of the revenue act of 1917, supra, and general in referring to "all possible legal rights of the taxpayer." The commissioner did not notify the respondent that it could not, under this claim, raise any point other than that specifically referred to in the claim. The commissioner did consider the specific part of the claim and grant a partial refund after recalculating the
8 taxpayer's invested capital, under section 210 of the revenue act of 1917. (Findings 6 and 7.) This in no way involved any consideration of a deduction for patent exhaustion, a matter provided for in quite a different part of the revenue act. We submit that the Court of Claims was wrong in concluding from such inaction and the partial refund made by the commissioner that he waived the insufficiency of the respondent's claim.

A few cases have considered what constitutes a waiver of the provisions of the statute and regulation in question. In Tucker v. Alexander, 275 U. S. 228, stipulation by counsel in open court at the trial was held such a waiver. In Black v. Bolen, 268 Fed. 427 (W. D. Okla.), Union Trust Co. of Pittsburgh v. McCaughn, 24 F. (2d) 459 (E. D. Pa.,), and Art Metal Const. Co v. United States, 35 F. (2d) 379 (W. D. N. Y.), certain statements written to the taxpayer by the commissioner were held waivers. In the very similar case of Arizona Commercial Mining Co. v. Casey, 32 F. (2d) 288 (D. Mass.), a letter written by the commissioner showing that he had in fact considered the point not raised by the claim for refund was held not to be a waiver of his objection to a suit on this new point. See also Stauffer, Eshleman & Co., Ltd. v. United States, 66 Ct. Cls. 277. But in no case has a waiver been found upon such facts as are present in the instant case.

9 2. The Court of Claims rules in substance that the taxpayer could sue on a basis not disclosed in its claim for refund because it was know at the time the claim was filed that it was the commissioner's policy to reject claims filed on such basis. This decision is in conflict with the reasoning in Rand v. United States, 249 U. S. 503, and Rock Island A. & L. R. R. Co. v. United States, 254 U. S. 141. In each of these cases it was held that the failure to file a claim was not excused because the filing of such a claim would have been futile.

3. If there was no waiver, the Court of Claims erred in allowing recovery on a ground not clearly set forth in the respondent's claim for refund. It is submitted that the reasoning of this court in Tucker v. Alexander, 275 U. S. 228, is conclusive on this point. The lower Federal courts, including the Court of Claims, have decided virtually without exception that under the statute and regulations a taxpayer cannot recover upon a ground distinct from any presented to the commissioner in the claim for refund or not clearly set forth herein. Red Wing Malting Co. v. Willcuts,

15 F. (2d) 626, 634 (C. C. A. 8th), certiorari denied, 273 U. S. 763; Feather River Lumber Co. v. United States, 66 Ct. Cls. 54, certiorari denied, 279 U. S. 837; Jonesboro Grocery Co. v. United States, 66 Ct. Cls. 320, certiorari denied, 280 U. S. 40A; National Candy Co. v. United States, 67 Ct. Cls. 74, 88, certiorari denied, 280 U. S. 60A; Meinrath Brokerage Co. v. Crooks, 28 F. (2d) 991 (W. D. Mo.); Arizona Commercial Mining Co. v. Casey, 32 F. (2d) 288 (D. Mass.); Paul Jones & Co. v. Lucas, 33 F. (2d) 907 (W. D. Ky.); Phoenix Glass Co. v. United States, 34 F. (2d) 217 (W. D. Pa.). The only decisions to the contrary are two cases decided by the same judge in the District of Connecticut. Union & New Haven Trust Co. v. Eaton 20 F. (2d) 419; Warner v. Walsh, 24 F. (2d) 449.

4. Section 1318 of the revenue act of 1921, supra, and article 1036 of Treasury Regulations 62, supra, were devised "for the convenience of Government officials in passing upon claims for refund and in preparing for retrial." Tucker v. Alexander, 275 U. S. 228, 231. The decision of the Court of Claims, if allowed to stand, will result in a multitude of claims for refund in general terms under which taxpayers may at any time raise new objections to taxes collected. Such a condition would greatly impede and delay the commissioner in the proper administration of his duties.

11 Conclusion

Wherefore it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

MAY, 1930.

12 In Court of Claims of the United States

No. H–62

FELT & TARRANT MFG. CO. vs. THE UNITED STATES

I. *History of proceedings*

On February 14, 1927, the plaintiff filed its original petition.

On March 26, 1927, the defendant filed a general traverse to said petition.

On June 28, 1928, by leave of court, the plaintiff filed an amended petition.

Said amended petition is as follows:

II. *Amended petition*

Filed June 28, 1928

To the honorable the JUDGES OF THE COURT OF CLAIMS OF THE UNITED STATES:

Plaintiff, the Felt & Tarrant Mfg. Co., a corporation organized under the laws of the State of Illinois, and having its principal office and place of business in the city of Chicago, in said State, files this amended petition to recover from the United States of America the sum of $92,121.10 paid to the collector of internal revenue for the First District of Illinois as and for its Federal income and profits tax for the year 1917 in excess of the amount which should have been paid for that year, together with interest; and therefore shows:

13- (1) The plaintiff is and was at all of the times hereinafter mentioned engaged in the trade or business of manufacturing and selling calculating machines, commonly known as comptometers.

(2) On or about the 15th day of March, 1918, the plaintiff filed with the said collector of internal revenue its income and profits tax return for the year 1917.

(3) On or about the 14th day of June, 1918, the plaintiff paid to said collector of internal revenue the income and profits tax shown to be due and payable by said return—namely, $260,328.05.

On or about the 10th day of April, 1925, plaintiff paid an additional amount of $2,436.30 on account of taxes for calendar year 1917.

(4) On or about the 17th day of December, 1924, the Commissioner of Internal Revenue determined that plaintiff's correct income and profits tax liability for the year 1917 was $241,994.58, and the amount by which the plaintiff had overpaid its taxes for the year 1917, according to said determination of the commissioner—namely, $20,769.77—was credited against and in reduction of income and profits taxes then claimed to be due from the plaintiff for the calendar year 1918.

(5) On March 1, 1913, and continuously thereafter until a date subsequent to December 31, 1917, the plaintiff owned the patents listed below. The numbers assigned to such patents by the United States Patent Office, the respective dates of issue, the unexpired life as of March 1, 1913, of each of said patents and the average unexpired life of said patents was as follows:

14 Patent numbers	Dates of issue	Unexpired life as of March 1, 1913
671109	April 2, 1901	5 years, 33 days.
733370	July 14, 1903	7 years, 136 days.
762520	June 14, 1904	8 years, 106 days.
762521	June 14, 1904	8 years, 106 days.
767107	Aug. 9, 1904	8 years, 162 days.
982416	Jan. 24, 1911	14 years, 330 days.
982417	Jan. 24, 1911	14 years, 330 days.
1023344	June 4, 1912	16 years, 96 days.
Average unexpired life as of March 1, 1913		10 years, 162 days.

(6) The plaintiff used or employed all of said patents during the whole of the year of 1917 in its trade or business.

(7) The value of said patents on March 1, 1913, was $1,386,919.24.

(8) The income and profits tax shown to be due on the plaintiff's return for the year 1917 filed as aforesaid was based upon a computation of the plaintiff's net income for the year 1917, in which no reduction was made from the plaintiff's gross income for the year 1917 for the exhaustion of said patents.

(9) The income and profits tax for the year 1917 determined by the Commissioner of Internal Revenue to be due from the plaintiff as alleged in paragraph 4 above was based upon a computation of the plaintiff's net income for the year 1917, in which no deduction had been made from the plaintiff's gross income for the year 1917 for the exhaustion of said patents.

(10) During the whole of the year 1917 the plaintiff owned and used or employed in its trade or business the patents listed below.

All of said patents were acquired subsequent to March 1, 1913,
15 and on or about the dates upon which they were issued by the United States Patent Office. The monopoly granted by none of said patents had expired prior to December 31, 1917. The numbers of said patents and the dates upon which they were issued by the United States Patent Offiec are as follows:

Patent numbers	Date of issue
1,066,096	July 1, 1913
1,752,934	Sept. 9, 1913
1,072,993	Sept. 9, 1913
1,074,704	Oct. 7, 1913
1,074,705	Oct. 7, 1913
1,074,689	Oct. 7, 1913
1,088,219	Feb. 24, 1914
1,154,897	Sept. 28, 1915
1,110,734	Sept. 15, 1914

(11) Prior to the respective dates upon which said patents were issued and during the years 1910, 1911, 1912, and 1913, the plaintiff expended in acquiring and developing said patents the sum of $136,519.63.

(12) The income and profits tax shown to be due on the plaintiff's return for the year 1917, and paid as alleged in paragraph 3 above, was based upon a computation of the plaintiff's net income for the year 1917, in which no deduction was made from the plaintiff's gross income for the year 1917 for the exhaustion of said patents.

(13) The income and profits tax for the year 1917 determined by the Commissioner of Internal Revenue to be due from the plaintiff as alleged in paragraph 4 above was based upon a computation of the plaintiff's net income for the year 1917, in which no deduction had been made from the plaintiff's gross income for the year 1917 for the exhaustion of said patents.

16 (14) Prior to January 1, 1917, and during the years 1900 to 1916, both inclusive, the plaintiff expended the sum of

$377,454.02 in acquiring and developing the patents described and enumerated in paragraphs 5 and 10 above and certain inventions for which patents were thereafter issued.

(15) The total depreciation or exhaustion of the cost of said patents form the respective dates upon which they were issued to and including December 31, 1916, was the sum of $60,697.90.

(16) The income and profits tax shown to be due on the plaintiff's return for the year 1917, filed as alleged in paragraph 2 above, was based upon a computation of the plaintiff's invested capital for the year 1917 in which only $20,454.02 of said sum of $377,454.02 was included in invested capital.

(17) The income and profits taxes for the year 1917 determined by the Commissioner of Internal Revenue to be due from the plaintiff, as alleged in paragraph 4 above, were based upon a computation of the plaintiff's invested capital for the year 1917, in which only $20,454.02 of said sum of $377,454.02 was included in invested capital.

(18) The plaintiff avers that the assessment and collection of said taxes without allowing a deduction from the plaintiff's gross income for the exhaustion of said patents, and without including in the plaintiff's invested capital the entire amount expended in the acquisition and development of said patents less the depreciation or exhaustion of the cost of said patents from the respective dates upon which said patents were issued to and including December 31, 1916, as alleged above, was erroneous and illegal and led to the im-
17 position of income and profits taxes greater than the correct and lawful amount thereof to the extent of $92,121.10.

(19) On or about January 31, 1923, the plaintiff filed with the Commission of Internal Revenue a waiver of its right to have its income and profits taxes for the year 1917 determined and assessed within five years after its return for said year was filed.

(20) On or about the 29th day of February, 1924, the plaintiff filed with the collector of internal revenue for the First District of Illinois, a claim for the refund of income and profits taxes erroneously or illegally assessed and collected for the year 1917 in the sum of $214,122.01. A copy of said claim is attached hereto and made a part hereof, marked "Schedule A."

(21) Said claim for refund was rejected by the Commissioner of Internal Revenue on or about the 16th day of February, 1925.

(22) Plaintiff avers that it has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government; that it is the sole and absolute owner of the claims herein presented; that it has made no transfer or assignment of said claim or any part thereof; and that it is justly entitled to the amount claimed herein from the United States after allowing all just credits and set offs.

Plaintiff, therefore, prays judgment in its favor against the United States in the sum of $92,121.10, with interest from June 14, 1918, the date of the payment of the said tax.

FELT AND TARRANT MFG. CO.,
By WM. F. BABCOCK, *Treas.*

ROBERT H. MONTGOMERY,
Attorney for Plaintiff.

18 [*Duly sworn to by Wm. F. Babcock; jurat omitted in printing.*]

19 *Schedule A to amended petition*

(Execute separate form for each tax period)

Treasury Department, Internal Revenue Service.
Form 843—Jan., 1922. Comptroller General U. S. January 18, 1922.

IMPORTANT.—File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

CLAIM FOR

Abatement of tax assessed
Credit against outstanding assements
XX Refund of taxes illegally collected
Refund of amounts paid for stamps used in error or excess

NOTICE TO COLLECTOR.—Collector must indicate in block above the kind of claim, except in income-tax cases.

Date received by administrative unit, ——— (stamp here).
Collector's notation: District, ———. Account number, ———.
Date received, ——— (stamp here). ——— ———, collector of internal revenue.

State of Illinois,
County of Cook, ss:

FELT AND TARRANT MFG. CO.,
(Name of taxpayer or purchaser of stamps)

1717 North Paulina Street,
(Residence—give street and number as well as city or town and State)

Chicago, Illinois.
(Business address)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period	Year
	From: Jan. 1	1917
	To: Dec. 31	1917

1. Business in which engaged: Manufacture and sale of calculating machines.
2. Character of assessment or tax———
(State for or upon what the tax was assessed or the stamps affixed)

3. Amount of assessment or stamps purchased $200,328.05
4. Reduction of Tax Liability requested (income and profits tax) .. 214,122.01
5. Amount to be abated.
6. Amount to be refunded (or such greater amount as is legally refundable) 214,122.01
7. Dates of payment (see collector's receipts or indorsements of canceled checks): June 15, 1918.
(If statement covers income tax liability, items 8–11 inclusive must be answered.)
8. District in which return (if any) was filed: Chicago.
9. District in which unpaid assessment appears.....
10. Amount of overpayment claimed as credit ..... $.....
11. Unpaid assessment against which credit is asked; period from ..... to ..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess profits tax assessed for this period.

This claim is filed to protect all possible legal rights of the taxpayer, pending, and at the rate of, the settlement of the claim for relief. Computation has been made as follows:

Total profits taxes paid	$227,789.38
Less: Decrease in income taxes on account of profits taxes credit ..	13,667.37
Refund claimed	214,122.01

The taxpayer requests an oral hearing and the right of appeal in the event of an adverse decision on the part of the unit and before any formal rejection of the claim is made.

FELT & TARRANT MANUFACTURING CO.
(Signed) WILLIAM F. BABCOCK, *Treasurer.*

Sworn to and subscribed before me this 29th day of February, 1924.
CHARLES A. STEFFEN.

20 III. *General traverse*

Filed Aug. 7, 1928

And now comes the Attorney General, on behalf of the United States, and, answering the amended petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the amended petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

IV. *Argument and submission of case*

On December 17, 1929, this case was argued and submitted on merits by Mr. Thomas G. Haight, for plaintiff, and by Mr. R. C. Williamson, for defendant.

21 V. *Findings of fact, conclusion of law, and opinion of the court, by Booth, Ch. J.*

Filed February 17, 1930

Mr. Thomas G. Haight for plaintiff. Messrs. Robert H. Montgomery, J. Marvin Haynes, James O. Wynn, and C. J. McGuire were on the brief.

Mr. Ralph C. Williamson, with whom was Mr. Assistant Attorney General Herman J. Galloway, for the defendant. Mr. Ottamar Hamele was on the brief.

This is a suit to recover for the exhaustion of patents owned and used by plaintiff prior to March 1, 1913. The case is contested by the defendant on the sufficiency of the claim for refund of the amount of depreciation of patents.

The facts are stipulated.

1. Plaintiff, Felt & Tarrant Manufacturing Company, is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business in the city of Chicago, State of Illinois.

2. On April 1, 1918, plaintiff filed with the collector of internal revenue for the first district of Illinois its income and excess profits tax returns for the calendar year 1917, showing a tax liability of $260,328.05. This amount was paid to said collector of internal revenue on June 15, 1918.

3. On November 10, 1919, the Commissioner of Internal Revenue notified the plaintiff that a redetermination of its tax liability for the calendar year 1917 resulted in an overassessment of $20,769.77. On June 19, 1920, said collector of internal revenue credited the last-named sum against income and profits taxes assessed against plaintiff for the calendar year 1918.

4. On February 2, 1923, plaintiff filed with the Commissioner of Internal Revenue a waiver of its right to have its income and excess profits taxes for the calendar year 1917 assessed within five years from the date its return for that year was filed. This waiver extended the period for making assessments to March 1, 1924.

5. In March, 1923, additional income and excess profits taxes for the calendar year 1917 of $19,486.85 were assessed against the plaintiff.

6. On February 29, 1924, plaintiff filed with said collector of internal revenue a claim for the refund of $214,122.01. A true copy thereof is attached to plaintiff's amended petition as Schedule A,
22 and is made a part hereof by reference thereto. Under this claim the plaintiff filed a brief and had an oral hearing in the office of the Commissioner of Internal Revenue. The sole contention presented by the plaintiff in said brief and at said hearing was that the plaintiff was entitled to assessment under section 210 of the revenue act of 1917. At no time during the course of the proceedings under said claim for refund was any question raised

by plaintiff relative to depreciation of patents or adjustment of value of patents for invested capital purposes.

7. On December 17, 1924, the Commissioner of Internal Revenue notified the plaintiff that a reaudit of its income and excess profits tax returns for the calendar year 1917 under the provisions of section 210 of the revenue act of 1917 disclosed a total tax liability of $241,994.49 and a resultant overassessment of $17,050.55. The aforesaid claim for refund of $214,122.01 was allowed for $17,050.55 and the balance was rejected by the Commissioner of Internal Revenue on February 16, 1925.

8. On April 15, 1925, said collector of internal revenue abated $17,050.55 of the aforesaid additional assessment of $19,486.85 made in March, 1923. The balance of $2,436.30 of the additional assessment of $19,486.85 was paid by plaintiff on April 10, 1925.

9. On March 1, 1913, and continuously thereafter until a date subsequent to December 31, 1917, the plaintiff owned the patents listed below. All of said patents were acquired prior to March 1, 1913, and on or about the dates upon which they were issued by the United States Patent Office. The numbers assigned to such patents by the United States Patent Office, the respective dates of issue, the unexpired life as of March 1, 1913, of each of said patents, and the average unexpired life of said patents were as follows:

Patent numbers	Dates of issue	Unexpired life in months as of March 1, 1913
671109	Apr. 2, 1901	61
738379	July 14, 1903	89
762520	June 14, 1904	100
762521	June 14, 1904	100
767107	Aug. 9, 1904	101
982416	Jan. 24, 1911	179
982417	Jan. 24, 1911	179
1028344	June 4, 1912	195
	Total	1,004

10. The value of the aforesaid patents on March 1, 1913, was $821,557.79. The monthly total exhaustion rate of the aforesaid patents during their life was $818.28465. In the taxable year 1917 there was a total time exhaustion of 96 months. The value exhaustion in 1917 was $78,455.33 ($96 \times \$818.28465 = \$78,455.33$).

11. In the determination of the aforesaid 1917 tax liability of $241,994.49, finding 7, no deduction was made from plaintiff's gross income for the year 1917 for the exhaustion of the patents, as set forth in finding 10.

12. In addition to the patents listed in finding 9, the plaintiff owned and used or employed in its trade or business during the year 1917 patents listed below. All of said patents were acquired
23 subsequent to March 1, 1913, and on or about the dates upon which they were issued by the United States Patent Office.

The monopoly granted by said patents had not expired prior to December 31, 1917. The numbers of said patents and the dates upon which they were issued by the United States Patent Office are as follows:

Patent numbers	Dates of issue
1066096	July 1, 1913
1152954	Sept. 9, 1913
1072093	Sept. 9, 1913
1074704	Oct. 7, 1913
1074705	Oct. 7, 1913
1074689	Oct. 7, 1913
1088219	Feb. 24, 1914
1154897	Sept. 28, 1915
1110784	Sept. 15, 1914

13. Prior to the respective dates on which the patents listed in finding 12 were issued plaintiff expended in acquiring and developing said patents the sum of $136,846.23. This cost was exhausted during the taxable year 1917 to the extent of $8,049.77.

14. In the determination of the aforesaid 1917 tax liability of $241,994.49, finding 7, no deduction was made from plaintiff's gross income for the year 1917 for the exhaustion of the patents as set forth in finding 13, nor has plaintiff at any time for the year 1917 had the benefit of any such deduction in the determination of its 1917 tax liability.

15. Plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government. It is the sole and absolute owner of the claim herein presented, and it has made no transfer or assignment of said claim or any part thereof.

16. If the court finds that the plaintiff is not barred by section 3226 of the United States Revised Statutes, as amended, from claiming in this suit as deductions from gross income the amounts of $78,455.33 and $8,049.77, described in findings 10 and 13, then judgment should be for the plaintiff in the amount of $26,909.50, plus interest as provided by law.

17. If the court finds that the plaintiff is barred by section 3226 of the United States Revised Statutes, as amended, from claiming in this suit as deductions from gross income the amounts of $78,455.33 and $8,049.77, described in findings 10 and 13, then judgment should be for the defendant.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover $26,909.50 with interest.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-six thousand nine hundred nine dollars and fifty cents ($26,909.50), with interest at the rate of six per cent per annum from the dates of payments to such date as the Commissioner of Internal Revenue may determine,

in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the revenue act of May, 1928.

24 *Opinion*

BOOTH, Chief Justice, delivered the opinion of the court:

The history of this tax case follows in sequential order, viz:

(a) April 1, 1918: Plaintiff filed income and excess profits tax return, tax liability $200,328.05
(b) June 15, 1918: Plaintiff paid tax disclosed by above return 200,328.05
(c) November 10, 1919: Commissioner determined an overassessment of 20,769.77
(d) June 19, 1920: Commissioner credited overassessment (item c) to 1918 taxes 20,769.77
(e) February 2, 1923: Plaintiff filed written waiver of limitations extending date to March 1, 1924.
(f) March, 1923: Commissioner determined a deficiency in 1917 tax of 19,486.85
(g) February 29, 1924: Plaintiff filed claim for a refund of 1917 tax to amount of 214,122.01
Refund claim was accompanied by a brief and request for oral argument. The refund claim is set out in the findings.
(h) December 17, 1924: Commissioner determined plaintiff's 1917 tax as follows:
Total tax liability $241,994.49
Overassessment 17,050.55
(i) February 16, 1925: Official allowance of refund claim (item g) for $17,050.55. Rejected as to balance claimed.
(j) April 10, 1925: Plaintiff paid balance of 1917 tax as per rulings of the commissioner 2,436.30
(k) April 15, 1925: Commissioner abated tax of 1917 to extent of 17,050.55

Plaintiff sues to recover $26,909.50 and interest, alleged as an overpayment of taxes due to a failure to allow a deduction from gross income for the year 1917 for exhaustion of patents acquired by the plaintiff and used by it in its business prior to March 1, 1913. The defendant concedes the amount and likewise admits that the single impediment to recovery is the sufficiency of the refund claim filed February 29, 1924. The various steps taken in the final determination of plaintiff's 1917 tax liability, as appears from the history of the case set forth above, discloses indisputably that the refund claim of February 29, 1924, was filed with the commissioner within the statutory period of limitations and over a year prior to the final determination of the tax liability of the plaintiff for 1917.

The refund claim of February 29, 1924—the important instrument involved herein—reads in part as follows:

"The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess-profits tax assessed for this period.

"This claim is filed to protect all possible legal rights of the taxpayer, pending and at the date of, the settlement of the claim for relief. Computation has been made as follows:

"Total profits taxes paid $227,789.38
Less: Decrease in income taxes on account of profits taxes credit 13,667.37
Refund claimed ..... 214,122.01"

The taxpayer requested an oral hearing and the right of appeal in the event of an adverse decision on the part of the unit, and before any formal rejection of the claim was made.

27. Section 210 of the revenue act of 1917 (40 Stat. 307) provides for special assessments, and it is to be noted that the refund claim makes no specific mention of a deduction from gross income on account of exhaustion of patents.

Section 1318 of the revenue act of 1921 (42 Stat. 227), upon this subject, provides as follows:

"That section 3226 of the Revised Statutes is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *"

Article 1036, Treasury Regulations 62, prescribed as follows:

"Claims for refund of taxes erroneously collected.—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath."

Section 1318 and the regulations cited undoubtedly require that all the facts relied upon for a refund should be set forth under oath. The courts have construed section 1318 and the regulations made in pursuance of the authority granted therein. The cases, which we need not review in detail, are harmonious upon the point that the purpose and intent of the statute is to afford the commissioner an opportunity to correct errors specified in the refund claim, and to enable the taxpayers to escape the necessity for needless and burdensome litigation. Tucker v. Alexander, 275 U. S. 228; Red Wing Malting Co. v. Willcuts, 15 Fed. (2d) 626; Feather River Lumber Co. v. United States, 66 C. Cls. 54; Jonesboro Grocer Co. v. United States, 66 C. Cls. 320; Phoenix Glass Co. v. United States, P-H Fed. Tax Service, 1929, sec. 834; National Candy Co. v. United States, 67 C. Cls. 74. In the case of Tucker v. Alexander (supra) the Supreme Court, in speaking of the statute and regulations, used this language:

"The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of Government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery."

The Alexander case turned upon the question of waiver of the sufficiency of the refund claim. A similar contention is advanced

by the plaintiff in this case. It is to be observed from the history of this case that the plaintiff did not in its original tax return claim a deduction from gross income for the year 1917 for depreciation or exhaustion of patents owned and used by it. This is important, in view of the fixed attitude of the Internal Revenue Bureau with reference to claimed deductions of this character. The com-
26 missioner's Regulations 45, article 163, p. 69, provided for a deduction from gross income on account of depreciation of patents. In article 167 of Regulations 45, page 70, it was provided that in computing depreciation allowance in case of a patent, the capital sum to be replaced was the cost not already deducted as a current expense, or its fair market value as of March 1, 1913, if acquired prior thereto. In an opinion from the Committee on Appeal and Review (Cumulative Bulletin III–1, page 176), it was held that the right to charge off depreciation of patents was optional with the taxpayer, i. e., a privilege to do so if the taxpayer saw fit to avail himself of the privilege, and that the right to exercise the option or privilege extended to and was only open to the taxpayer during the time for filing the *original* return (italics ours); that if not claimed in the orignial return for the year the taxpayer with respect to that year was thereafter precluded from claiming the deduction. The foreging opinion of the committee on appeal and review was supported by a memorandum opinion of the Solicitor of Internal Revenue, and from henceforward until June, 1925, the commissioner observed and continued the policy of refusing deductions from gross income on account of depreciation of patents unless the deduction was specifically claimed in the original return for the year involved. In June, 1925, the Board of Tax Appeals, in the case of the Union Metal Manufacturing Co., 1 B. T. A. 395, decided that a taxpayer was entitled to depreciation of patents notwithstanding the fact that no claim for such a deduction had been made in the original return, thereby withholding approval of the previous and settled policy of the bureau. Subsequent to the decision of the board the commissioner, in Internal Revenue Cumulative Bulletin IV–2 for the period January 1 to June 30, 1925, published at page 3 thereof, some time after the last-mentioned date, acquiesced in the decision of the board in the Union Metal Mfg. Co. case, and thereafter the rule of the bureau as to an allowance from gross income of deduction on account of depreciation of patents was changed and the allowance given consideration. Therefore it is apparent from recited events that at the time the plaintiff's refund claim was filed and on the date it was rejected the published decisions of the commissioner absolutely prevented the plaintiff, in so far as the bureau was concerned, from taking a deduction from gross income for depreciation of patents for the year 1917. It would have been a useless and futile act to have specified in detail with respect to patent depreciation in the face of adhered-to adjudications upon the subject, and the commissioner was not deprived of any knowledge or in any way misled by the failure of the plaintiff to make a detailed claim as to patent

depreciation. Had it been so made it would have been rejected upon prior holdings. Under these circumstances it is, we think, established that in so far as the intended purpose of the statute and regulations is concerned—an intent and purpose ascribed to them in various decisions of the courts—the commissioner was not denied the privilege of passing upon the merits of plaintiff's tax liability under the return filed and the refund claim of February 29, 1924. The determination of the plaintiff's tax liability was evidently involved. It required a period of seven years to bring it to a conclusion, and the final closing of the proceedings was not until April 10, 1925. The plaintiff, it is true, might have petitioned the commissioner for a reconsideration of his refund claim following the reversal of policy with respect to patents in June, 1925; but it is also true that a reconsideration was manifetsly fraught with the apparent and almost certain rejection for the very reasons insisted upon by the defendant here, and the additional danger of delay in reconsideration carrying its final determination beyond the statutory limitations allowing suit for the recovery of illegal tax exactions in this court. If the oft-repeated adjudication of the intent of the law and the purpose to be served in exacting, particularly in refund claims, is to govern in its application to an admitted illegal exaction, this case falls squarely within such a rule. The refund claim filed was much in excess of the amount sued for in this case. It was rejected as to $197,071.46, and it is difficult to perceive a valid reason for denying judgment upon the restricted basis of a failure to do what would have been of no benefit to either party if it had been done.

27

In addition to what has been said, the refund claim relied upon did on its face indicate in express terms a distinct reservation and determination to insist upon the refund of all illegal tax exactions. By the use of such comprehensive terms it is to say the least perfectly apparent that the taxpayer notified the commissioner that all its legal rights would be insisted upon. True, such general terms do not meet the express provisions of the regulation; but as said, not without some merit, the commissioner received the refund claim, acted upon it as it was, and a year thereafter actually granted a refund of $17,050.55. No complaint was lodged as to its generality in any respect at the hearing thereon and no exceptions taken as to its consideration at any time. The Supreme Court reversed the lower court in the Tucker *v.* Alexander case (supra). In the opinion the court said:

"If the commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the Government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings."

In the above case there was an entire absence of any specification of the nature of the claim relied upon in the refund claim filed by

the taxpayer, the taxpayer contending for a new and entirely different state of facts for relief. The Government interposed no objections to the proceedings at the trial, and the Supreme Court reversed the decision of the lower court in refusing a judgment for the taxpayer, holding that the right to insist upon a strict claim for refund had been waived by the commissioner. While it may be going too far to extend the rule in the above case to this one, nevertheless it is worthy of observation to call attention to the fact that in this case the plaintiff is not insisting upon a claim different from one falling within the comprehensive language used in the refund claim, and that the commissioner was not in any sense misled
28 as his prior rulings disclose, and he acted upon and made a refund without objection to the refund claim in any particular. The final action of the commissioner as to the refund claim was confined to the subject matter of section 210 of the act of 1917, i. e., special assessment, and it seems to us that notwithstanding the general language of the refund claim in other respects the commissioner would have been warranted in refunding any sums found to be due as overassessments for other causes.

Judgment will be awarded the plaintiff for $26,909.50 with interest. It is so ordered.

WILLIAMS, Judge; LITTLETON, Judge; and GRAHAM, Judge, concur. GREEN, Judge, dissents.

29 VI. *Judgment*

At a court of claims held in the city of Washington on the 17th day of February, A. D., 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of Twenty-six thousand nine hundred nine dollars and fifty cents ($26,909.50), with interest at the rate of six per cent per annum from the dates of payments to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the revenue act of May, 1928.

30 [Clerk's certificate to foregoing transcript omitted in printing.]

[Endorsement on cover:] File No. 35027. Court of Claims. Term No. 896. The United States, petitioner vs. Felt & Tarrant Mfg. Co. Petition for writ of certiorari and exhibit thereto. Filed May 14, 1930. File No. 35027.

U. S. GOVERNMENT PRINTING OFFICE: 1930

31 Supreme Court of the United States

Order allowing certiorari

Filed June 2, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

119880—30

FILE COPY

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CHARLES ELMORE CROP
CLERK

No. 116

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

v.

FELT & TARRANT MFG. CO.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 116.

THE UNITED STATES, PETITIONER

v.

FELT & TARRANT MFG. CO.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 14) is reported in 69 C. Cls. 204; 37 F. (2d) 977.

JURISDICTION

The judgment of the Court of Claims was entered February 17, 1930. (R. 18.) Petition for writ of certiorari was filed May 14, 1930 (R. 18), and the writ was granted June 2, 1930 (R. 19), 281 U. S. 719. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a refund of income and profits taxes should be granted for a matter not mentioned in a claim for refund.

2. Whether the Commissioner of Internal Revenue, by failing to object to the generality of the respondent's claim for refund and by acting on the claim so far as it was specific, waived objection to the insufficiency of the claim as to matters not specifically mentioned.

3. Whether the respondent's failure to file a specific claim for refund on the ground of exhaustion of patents was excused because at the time of filing the claim it was known that such a claim would be rejected by the Commissioner.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 14–17.

STATEMENT

The respondent contends, and the United States concedes, that the respondent was entitled to a deduction from gross income for the year 1917 on account of exhaustion of patents. Had this deduction been made, the respondent's taxes for 1917 would have been reduced in the sum of $26,909.50. The United States agrees that the respondent would be entitled to judgment for this amount

with interest, had the respondent filed a sufficient claim for refund, as required by Section 1318 of the Revenue Act of 1921 (*infra*, p. 15) and article 1036 of the Treasury Regulations 62 (*infra*, p. 16).

On February 2, 1923, respondent filed a waiver of its right to have its taxes for 1917 assessed within five years from the date its return had been filed. (Finding 4; R. 11.)

On February 29, 1924, the respondent filed a claim for refund on Form 843. This made no reference to any claim because of exhaustion of patents. The claim consisted merely of answers to questions on the form and the following statement (Finding 6; R. 11; Schedule A, R. 9):

> The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess-profits tax assessed for this period.
>
> This claim is filed to protect all possible legal rights of the taxpayer, pending, and at the rate [date] of, the settlement of the claim for relief. Computation has been made as follows:

Total profits taxes paid	$227,789.38
Less: Decrease in income taxes on account of profits taxes credit	13,667.37
Refund claimed	214,122.01

> The taxpayer requests an oral hearing and the right of appeal in the event of an adverse decision on the part of the unit and before any formal rejection of the claim is made.

In support of this claim the respondent filed a brief, and an oral hearing was held in the office of the Commissioner of Internal Revenue. The sole contention presented in that brief and at the hearing was that the respondent was entitled to a special assessment under Section 210 of the Revenue Act of 1917. At no time during the course of the proceedings was any question raised by respondent relative to depreciation of patents or adjustment of value of patents for invested capital purposes. (Finding 6, R. 11.) At the time of these proceedings it was the regular practice of the Commissioner to reject any claim for depletion of patents which had not been made in the original return.

On December 17, 1924, the Commissioner notified respondent that under the provisions of Section 210 of the Revenue Act of 1917 (pp. 14–15, *infra*) respondent had been overassessed, and allowed the claim for refund in the amount thus found overassessed solely because of the reaudit and special assessment under Section 210, and on February 16, 1925, rejected it as to the balance. (Finding 7, R. 12.)

On January 27, 1925, the Board of Tax Appeals, in *Appeal of Union Metal Manufacturing Co.*, 1 B. T. A. 395, decided that a taxpayer who had made a specific claim for refund was entitled to a deduction on account of exhaustion of patents, notwithstanding the fact that no such claim had been made

in the original return. In May, 1925, the Bureau announced that it had acquiesced in that decision. (IV–1 Internal Revenue Cum. Bull., p. 3.)

The respondent filed its petition in the Court of Claims on February 14, 1927, and there for the first time claimed a deduction on account of exhaustion of patents. The Court of Claims awarded it judgment for $26,909.50 with interest. (R. 13.)

SPECIFICATION OF ERRORS TO BE URGED

1. The Court of Claims erred in holding that the respondent should be allowed a deduction for exhaustion of patents in spite of its failure to file a specific claim for such a deduction.

2. The Court of Claims erred in giving judgment for the respondent.

SUMMARY OF ARGUMENT

I. The respondent's claim for refund was insufficient under the provisions of the applicable statute and regulations, for the claim did not clearly set forth the facts relied upon to support it.

II. This insufficiency was not waived by the Commissioner. He was not informed that the taxpayer would seek a deduction for exhaustion of patents under this claim. He took no steps to inform the respondent that its claim was too general because the claim was sufficiently specific as to the single ground, namely, special assessment, presented to him at the hearing. There was no inten-

tional relinquishment of his right to a specific statement of the grounds relied upon by the respondent in support of its claim for refund.

III. Although at the time when the claim for refund was filed the practice of the Bureau was to reject claims for deductions for patent exhaustion which had not been made in the original return, the mere futility of filing a claim is no ground for dispensing with it. *Rock Island Railroad Co.* v. *United States,* 254 U. S. 141; *Rand* v. *United States,* 249 U. S. 503.

ARGUMENT

I

NO REFUND SHOULD BE GRANTED FOR A MATTER NOT MENTIONED IN A CLAIM FOR REFUND

Section 1318 of the Revenue Act[1] of 1921 (*infra,* p. 15), provides in part:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof * * *.

[1] The same provisions are enacted in Section 1014 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 343; and Section 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116.

Article 1036 of Regulations 62[2] (*infra*, pp. 16–17) promulgated February 15, 1922, under the Revenue Act of 1921, provides in part:

> Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath.

In the instant case the Commissioner was never advised that the taxpayer claimed a deduction for patent exhaustion. In its tax return no reduction of gross income was made on such a ground. (R. 7; Petition (8).) The claim was specific in seeking a special assessment under Section 210 of the Revenue Act of 1917 (*infra*, p. 14), although it stated that the claim was filed "to protect all possible legal rights of the taxpayer." At an oral hearing before the Commissioner under this claim for refund and in its brief in support thereof, the taxpayer's sole contention was that it was entitled to a special assessment, under Section 210 of the Revenue Act of 1917 (p. 14, *infra*). Depreciation of patents was not mentioned. In fact the Commissioner never knew of the existence of the present claim or the facts on which it is based until this suit was brought.

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[2] Similar provisions were made in Article 1355 of Regulations 65, promulgated under the 1924 Act, and in Article 1352 of Regulations 62, promulgated under the 1926 Act.

In *Tucker* v. *Alexander*, 275 U. S. 228, 231, this Court said:

> Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the Collector or the United States.

The lower Federal courts, including the Court of Claims, have held virtually without exception that under the statute and regulations a taxpayer can not recover upon a ground distinct from any presented to the Commissioner in the claim for refund. *Red Wing Malting Co.* v. *Willcuts*, 15 F. (2d) 626, 634 (C. C. A. 8th), certiorari denied, 273 U. S. 763; *Feather River Lumber Co.* v. *United States*, 66 Ct. Cls. 54, certiorari denied, 279 U. S. 837; *Jonesboro Grocer Co.* v. *United States*, 66 Ct. Cls. 320, certiorari denied, 280 U. S. 562; *National Candy Co.* v. *United States*, 67 Ct. Cls. 74, 88, certiorari denied, 280 U. S. 582; *Meinrath Brokerage Co.* v. *Crooks*, 28 F. (2d) 991 (W. D. Mo.); *Arizona Commercial Mining Co.* v. *Casey*, 32 F. (2d) 288 (D. Mass.); *Paul Jones & Co.* v. *Lucas*, 33 F. (2d) 907 (W. D. Ky.); *Phoenix Glass Co.* v. *United States*, 34 F. (2d) 217 (W. D. Pa.); *Connell* v. *Hopkins* 43 F. (2d) 773 (N. D. Texas); *Aladdin Co.* v. *Woodworth*, 43 F. (2d) 150 (E. D. Mich.); *Solomon* v. *United States* (S. D. N. Y.), decided December 22, 1930, reported in Prentice-Hall Federal Tax Serv-

ice 1931, Paragraph 381. Apparently the only decisions to the contrary are three cases in the District of Connecticut. *Union & New Haven Trust Co.* v. *Eaton,* 20 F. (2d) 419; *Warner* v. *Walsh,* 24 F. (2d) 449; *Warner* v. *Walsh,* 27 F. (2d) 952.

II

THE COMMISSIONER DID NOT WAIVE COMPLIANCE WITH THE REQUIREMENT THAT A CLAIM BE FILED SPECIFYING THE FACTS RELIED UPON

The Commissioner may waive the statutory requirement that the claim set forth the facts relied upon, but in the instant case he did not do so. There was no occasion for the Commissioner to object to the form of the claim. It specifically referred to one matter, in respect to which he acted. Neither the language of the claim nor the taxpayer's contentions under it indicated that the taxpayer intended it to cover any other matter. Indeed, it seems strained to construe the reference in the claim to "all possible legal rights of the taxpayer" as applying to anything more than the legal rights of the taxpayer in respect to the specific matter to which all other parts of the instrument clearly relate.

In *Tucker* v. *Alexander,* 275 U. S. 228, *supra,* which is relied upon by the court below, an express stipulation by counsel in open court was held a waiver of literal compliance with the statutory requirement. No such stipulation exists in the instant case. In *Black* v. *Bolen,* 268 Fed. 427 (W. D.

Okla.), *Union Trust Co. of Pittsburgh* v. *McCaughn*, 24 F. (2d) 459 (E. D. Pa.), and *Art Metal Construction Co.* v. *United States*, 35 F. (2d) 379 (W. D. N. Y.), certain statements written to the taxpayer by the Commissioner were held to be waivers. In *Howbert* v. *Penrose*, 38 F. (2d) 577 (C. C. A. 10th), a waiver was inferred from the admission in the pleadings by the Government that a claim for refund had been filed and its failure to set up the defense of generality and insufficiency.

In *Arizona Mining Co.* v. *Casey*, 32 F. (2d) 288 (D. Mass.), the taxpayer filed a claim for refund of 1917 taxes based wholly on the act of the Commissioner in reducing its invested capital. After rejection of the claim, suit was brought on the new ground that a further deduction should be allowed for depletion of its ore bodies during the year. Although the Collector conceded in his brief that one of the issues of fact was whether the taxpayer was entitled to an additional deduction for depletion, the court held (p. 291) "that the defendant did not, by his course of conduct, waive compliance with the statute and regulations," and permitted no recovery on that ground.

A waiver is the intentional abandonment or relinquishment of a known right. Cf. *Bennecke* v. *Insurance Co.*, 105 U. S. 355. The conduct of the Commissioner in the instant case can not properly be construed as constituting a waiver of his right

to a specific statement of the grounds relied upon by the respondent in support of its claim for refund.

III

THE RESPONDENT'S FAILURE TO FILE A SPECIFIC CLAIM FOR REFUND ON THE GROUND OF EXHAUSTION OF PATENTS WAS NOT EXCUSED BECAUSE AT THE TIME IT WAS KNOWN THAT SUCH A CLAIM WOULD BE REJECTED BY THE COMMISSIONER

At the time when the claim for refund was filed, February 29, 1924, it was the practice in the Bureau of Internal Revenue to reject claims for deductions for patent exhaustion which had not been made in the original return. This may have been the reason why the respondent failed to set forth this ground in the claim. Because of this the Court of Claims said (R. 16, 17):

> It would have been a useless and futile act to have specified in detail with respect to patent depreciation in the face of adhered-to adjudications upon the subject, and the commissioner was not deprived of any knowledge or in any way misled by the failure of the plaintiff to make a detailed claim as to patent depreciation. Had it been so made it would have been rejected upon prior holdings. Under these circumstances it is, we think, established that in so far as the intended purpose of the statute and regulations is concerned—an intent and purpose ascribed to them in various decisions of the courts—the commissioner was not denied the priv-

ilege of passing upon the merits of plaintiff's tax liability under the return filed and the refund claim of February 29, 1924.[3]

We maintain that, even if the respondent had reason to expect its claim for deduction on account of exhaustion of patents to be rejected, it should have presented it to the Commissioner at the outset. His rejection could not preclude a suit, and filing the claim in the form required by the regulations is a condition precedent to the right to bring suit. The very fact that it was well understood that the claim would be rejected was the best reason for filing it if suit was contemplated. The mere futility of stating the ground of patent depletion to the Commissioner is no excuse for failing to take that step required by the statute. *Rock Island Railroad Co.* v. *United States,* 254 U. S. 141, *supra.*

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[3] This reasoning is based largely upon an incorrect statement of fact by the court as to certain dates. The practice of the Bureau in regard to claims for patent depletion was reversed by the decision in the *Union Metal Manufacturing Company* case, 1 B. T. A. 395, decided on January 27, 1925, not "in June, 1925," as the opinion below erroneously states. Because of the waiver filed by the respondent, the time for filing a claim for refund of its 1917 taxes did not expire, under Section 281 (e) of the Revenue Act of 1924 and Section 284 (g) of the Revenue Act of 1926, until April 1, 1925. A new claim for refund specifically asserting the right to a deduction for exhaustion of patents, filed before April 1, 1925, might well have been allowed by the Commissioner. Soon afterwards he announced that he acquiesced in the decision of the Board. Anyway, the respondent had an opportunity, after learning of the *Union Metal Manufacturing Co.* decision, either to amend its claim or to file a new one setting up the claim for patent depletion.

In denying recovery in the similar case of *Rand* v. *United States*, 249 U. S. 503, 510, *supra*, this Court said:

> The Act of 1912 can not be made so compliant. It had its purpose and it is not satisfied by representative or negative action; it requires a positive and individual assertion of claim. The condition was easy of performance, its grant a concession, and there is no room for the plea to enlarge it beyond its words. It is direct and clear and liberal enough of itself. It says to the taxpayer: Make a claim for the tax you have paid, show its illegality, and it will be repaid to you. We cannot relax its requirements—certainly not on the assumption that they might have been useless if complied with.

CONCLUSION

It is respectfully submitted that the decision of the court below is erroneous and should be reversed, and that judgment should be entered for the United States.

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JANUARY, 1931.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

STATUTES

Section 210 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 307, provides:

> SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.
>
> For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of Treasury. In the case of a corpo-

ration or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

Section 1318 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 314, as amended by an Act of March 4, 1923, c. 276, 42 Stat. 1504, 1505, provides:

> SEC. 1318. That section 3226 of the Revised Statutes is amended to read as follows:
>
> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 281 (e) of the Revenue Act of 1924, c. 234, 43 Stat. 253, provides:

> (e) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.

This was reenacted *verbatim* in Section 284 (g) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 67.

REGULATIONS

Article 1036, Treasury Regulations 62, promulgated under the Revenue Act of 1921, provides:

> ART. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. In the case of the taxpayer's death, certified copies of the letters of administration or letters testamentary, or other similar evidence, must be annexed to the claim to show the authority of the administrator or executor. The affidavit may be made by an agent of the person assessed, but in such a

case a power of attorney must accompany the claim. Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and shall, unless otherwise directed, be sent directly to the proper persons. The Commissioner has no authority to refund on equitable grounds penalties legally collected. As to claims for refund of sums recovered by suit see article 1051.

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No. 116

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

v.

FELT & TARRANT MFG. CO.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

v.

FELT & TARRANT MFG. CO.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

On pages 11 and 12 of the respondent's brief, two decisions in the Western District of New York (*Zeller* v. *United States*, 35 F. (2d) 870, and *Art Metal Construction Company* v. *United States*, 35 F. (2d) 379) are relied upon to support the decision below in the instant case. On February 2, 1931, the Circuit Court of Appeals for the Second Circuit reversed the judgments in both of these cases. The opinions are reprinted in the Appendix to this reply brief, *infra*, pp. 3–10. The Circuit Court of Appeals recognized the conflict of authority on the point and expressly declined to fol-

low the decision of the Court of Claims in the instant case.

Respectfully submitted.

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CHARLES B. RUGG,
Assistant Attorney General.
BRADLEY B. GILMAN,
Attorney.

FEBRUARY, 1931.

APPENDIX

ART METAL CONSTRUCTION COMPANY *v.* UNITED STATES

(U. S. Circuit Court of Appeals, for the Second Circuit, February 2, 1931)

Before: L. Hand, Swan, and Chase, Circuit Judges.

Appeal by the defendant from a judgment for the plaintiff in an action in the District Court for the Western District of New York to recover for income and excess profits taxes erroneously paid.

L. HAND, Circuit Judge:

In 1919 the plaintiff filed a return for its income and profits tax, showing more than five hundred thousand dollars to be due, all of which it paid in that year. Later, at the request of the Commissioner it filed four waivers; the first on December 18, 1923, which expired on December 18, 1924; the next on January 19, 1925; the other two within the time of expiration of the preceding one. Thus, with the exception of the interval between December 18, 1924, and January 19, 1925, the extension of the Commissioner's time was continuous up to December 31, 1927. On February 26, 1924, while the first waiver was outstanding, the plaintiff filed a sworn claim for refund, upon the form prescribed in which it stated that it was engaged in manufacture, that the claim related to its income and profits tax, which had been

assessed at the figure returned, and that it requested a reduction of one dollar or more as the amount to be refunded. The only further contents of the claim was as follows: "This claim is filed pursuant to the provisions of Sec. 252 of the Revenue Act of 1921, as amended by the Act of March 4, 1923, for the refunding of any sum which, by reason of future Court Cases, Treasury Rulings, or for other reasons, it may appear has been illegally or erroneously assessed or collected. The purpose in submitting this claim is to protect the taxpayer's rights in respect of the time within which such claims must be filed." At this time the plaintiff was maintaining that it was entitled to a special assessment of its invested capital for the year, 1917, under the forerunner of Sec. 328 of the Act of 1918, but, as will be observed, the claim did not assert such a right for 1918.

Later, the Commissioner took up certain adjustments of its taxes, to which the plaintiff objected, and the waiver of January 19, 1925, already mentioned, was given in response to a letter from the Commissioner that his time to reassess would soon expire, and that he must have more time within which to consider the matter. Nothing further was done before April 1, 1925, the day when the plaintiff's right to make any claim for refund expired; but on April twenty-first, the Commissioner proposed to assess additional taxes for 1918 and 1919, and the plaintiff protested on May twenty-first, asking leave to file a brief. This it did on July sixth, objecting to the added taxes, and for the first time demanding a special assessment for 1918, for reasons then set forth. It may be assumed that this

was an adequate claim for a refund on that ground, if in season.

As above stated, the Commissioner thereafter twice asked for further waivers, each time referring to the proposed added assessment and once more generally "to the determination of your correct tax liability." The Board of Tax Appeals decided in July, 1926, that the plaintiff was entitled to a special assessment for 1917. Eventually in August and December, 1927, the Commissioner assessed a deficiency for 1919—not here in question—and found that the plaintiff had been overassessed for 1918, because entitled to a special assessment, as in 1917. He, however, decided that the claim for refund, first made in July, 1925, was too late, disregarding that of February, 1924.

Under the statutes as they existed in February, 1924, the plaintiff's time to file a claim for refund was limited to five years after the return was filed. (Sec. 252 of the Revenue Act of 1921, as amended by the Act of March 4, 1923, 42 Stat. 1504.) Thus the original claim was timely. This period was extended by the Act of 1926 (Sec. 284 (g)) until April 1, 1925, in cases where the taxpayer had filed a waiver; and it would have been further extended for a year more had the second waiver been given "before the expiration of the period" of the first, which was, however, not the case, because of the hiatus mentioned above. Hence any claim for refund was due before April 1, 1925, and the only claim filed in time was that of February, 1924. Unless this could be amended by the claim set up in the brief of July 6, 1925, there was no seasonable claim, and the Commissioner was right, since no

action of his could toll the statute, once the limitation had elapsed.

The supposed claim was no claim at all; it was a mere caveat, an attempt to reserve the taxpayer's right at some later time to file a claim, should something turn up, either because of a change in the rulings of the courts, or of the Department, or for any other reason which might lead him to suppose that he could get back what he had already paid. We are not therefore dealing with a claim ineffectually couched, which advised the Commissioner that the taxpayer had come to doubt the validity of any part of the tax. In such cases we may assume arguendo that much latitude would be allowed, not only to amend as to the amount demanded, but to amplify the grounds of the claim and perhaps to set out others.

The answer is made that the Commissioner must have known that a special assessment was in mind, because that had already been bruited for the year 1917, and it could not be supposed that what was demanded for one year would be abandoned for the next. So far as inferences are to count at all, the direct opposite was at least as reasonable. If the taxpayer, having already raised the question of a special assessment for 1917, meant by his claim for the next year to ask the same treatment, nothing would appear less likely than that he should then omit it. Perhaps a mere reference would have served, but it was surely most natural to suppose that he did not then intend to press what he had every reason to assert. Special assessments vary with the circumstances of the taxpayer; they are especially within the discretion of the Com-

missioner, and the facts of one year are not necessarily the facts of the next.

Moreover, we can not agree that such a claim can be pieced out by matter in pais certainly when it is no more than a general reservation of all future claims. Whatever the purpose of the statute, it is at least to advise the Commissioner that the taxpayer intends by it to assert that a part of his tax was never due. To allow him to substitute, not a claim, but a warning that he may in the future make a claim—which is all on any theory that the supposed claim was—substantially dispenses with the statute altogether. Presumably, it was to avoid exactly such resulting uncertainties that the act and the regulations required something definite enough for action. The claim called for, and indeed admitted, no action at all. Therefore the Commissioner was not bound to return it. It bore no evidence that the plaintiff had any present complaint in mind; there was no intimation until after April 1, 1925, that anything had happened which had caused it to doubt any item of the tax which it had itself computed and paid. Patently, the claim was nothing but an effort to extend the time which the statute had given; an effort which the Commissioner was no more bound to repudiate, than if it had expressly asserted such a right, as perhaps indeed it did.

Again, we can not see what difference it made that under existing rulings the claim would have been rejected, had it been a claim at all. A taxpayer who returns and pays a tax always thinks that he must pay it as the law is; else he would act otherwise. He is given a period in which to

repent his complaisance, but its limit confines him; so Congress has determined. Within it he must make up his mind what to challenge; his remedies are at hand, if he wishes in the courts to reverse the rulings of the Commissioner, or to persuade him to recant. It will not entitle him to an extension that, so far as he can see, he must be unsuccessful in limine; he must present and prosecute his claim, while he is in the way with his adversary. Anything else is merely a contrivance to escape what for good or ill Congress as seen fit to enact.

It must be confessed that the authorities are not in unison. It is always a harsh thing to sustain a statute of limitations against a conceded claim; doubly so, perhaps, in the case of taxes—exactions, whose grounds courts have always scrutinized narrowly. No doubt this accounts for the lengths to which the right of amendment has at times been pushed. Nevertheless, we find no authoritative decision against what, we can not help thinking, is the plain purport of the law.

In *Tucker* v. *Alexander*, 275 U. S. 228, the claim had set forth two grounds of illegality, and when the action came on for trial the tax was contested upon a third. The government counsel at the trial stipulated that if the suit was good on the merits the plaintiff should recover, notwithstanding the necessity of amending his claim; all this apparently took place before the time to file the claim had expired. The case is clearly to be distinguished; in the first place because a claim had been filed for refund of a specific part of the tax, and the amendment merely set up a new ground; second, because there was an express stipulation by the trial coun-

sel; last, because, as we have said, the limitation had not yet expired—at least this appears to have been true from the opinion in the court below (15 Fed. (2) 356). See also *Maryland Casualty Co.* v. *U. S.*, 251 U. S. 342, 354.

It is quite true that in *Felt & Tarrant Mfg. Co.* v. *U. S.*, 37 Fed. (2) 977 (Ct. Cl.), a claim, in as general language as that before us, was held sufficient, and that the other decisions of that court (*Feather River Lumber Co.* v. *U. S.*, 66 Ct. Cl. 54; *Jonesboro Co.* v. *U. S.*, 66 Ct. Cl. 320; *Taylor-Lockwood Co.* v. *U. S.*, December 8, 1930, can be reconciled with the ruling, though by somewhat close distinction. *Swift* v. *U. S.*, 67 Ct. Cl. 322, is clearly different. However, in *Ordway* v. *U. S.*, 37 Fed (2) 19, we held a similar claim to be a nullity in an especially aggravated case; and *U. S. ex rel. Endicott* v. *Mellon*, 39 Fed. (2) 505 (C. A. D. C.) is to the same effect. There the Commissioner had assessed an added tax which the taxpayer filed a claim to abate. In it he inserted a claim for refund of one dollar, and, so far as appears, never made any effort to amend. The claim was thought bad, though it is difficult to see why, if the plaintiff here is correct, since a claim for one dollar would ordinarily be read as comprising an unknown sum. The addendum in the case at bar, not present in that case, seems to us to be immaterial. *Red Wing Malting Co.* v. *Willcuts*, 15 Fed. (2) 626 (C. C. A. 8), while scarcely a ruling, points the same way.

In the district courts the decisions are also divided. *Leach* v. *Nichols*, 42 Fed. (2) 918; *Lehigh, etc., Co.* v. *U. S.*, 38 Fed. (2) 637; *Union, etc., Co.* v. *Eaton*, 20 Fed. (2) 419; *Warner* v. *Walsh*,

24 Fed. (2) 449; 27 Fed. (2) 952; and *Wunderle* v. *McCaughn*, 38 Fed. (2) 258, make for the plaintiff, though several of them are certainly distinguishable. *Meinrath Brokerage Co.* v. *Crooks*, 28 Fed. (2) 991; *Phoenix Glass Co.* v. *U. S.*, 34 Fed. (2) 217, and *Connell* v. *Hopkins*, 43 Fed. (2) 473, look the other way; though here again there is room for distinctions.

Judgment reversed; petition dismissed.

HENRY C. ZELLER AND EDWARD G. ZELLER *v.* UNITED STATES

(U. S. Circuit Court of Appeals, for the Second Circuit, February 2, 1931)

Before L. Hand, Swan, and Chase, Circuit Judges.

Appealed by the defendant from a judgment for the plaintiff in an action in the District Court for the Western District of New York to recover for income and excess-profits taxes, erroneously paid.

Per Curiam: While this case presents some variations in fact, they justify no further discussion than that in our opinion in *Art Metal Construction Company* v. *United States of America*. The facts are, indeed, stronger for the defendant.

For the reasons therein stated, the judgment is reversed and the petition is dismissed.

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CHARLES ELMORE

Supreme Court of the United States

No. 116 October Term, 1929.

THE UNITED STATES,

Petitioner,

vs.

FELT & TARRANT MFG. CO.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS G. HAIGHT,
ROBERT H. MONTGOMERY,
J. MARVIN HAYNES,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

No. 896—October Term, 1929.

THE UNITED STATES,
Petitioner,

vs.

FELT & TARRANT MFG. CO.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

This is a suit to recover excessive income and profits taxes paid by the respondent for the year 1917. It was heard by the Court of Claims on an agreed state of facts. In determining the respondent's tax liability, the Commissioner of Internal Revenue made no deduction for two items of patent depreciation or exhaustion actually sustained in the year 1917, the failure to make which deduction has resulted in an admitted overpayment of respondent's taxes for that year of $26,909.50 (R., p. 2). Judgment was awarded by the Court of Claims for that sum, together with interest (R., p. 18). The suit was resisted on the sole ground that the respondent had not filed a *sufficient* claim for refund. Within the statutory period, and before the respondent's tax liability was finally determined by the Commissioner, a claim for

refund was filed for much more than the amount sued for in this case. The Commissioner of Internal Revenue made no objections to the form of the claim, or otherwise, but a year after it was filed allowed the same to the extent of $17,050.55, rejecting the balance. No part of the sum thus allowed resulted from any deduction for the patent depreciation or exhaustion claimed in this suit. It was respondent's contention in the Court below that the Commissioner had waived any insufficiency in the claim for refund.

SUMMARY OF THE ARGUMENT.

I.

This case presents no public, special or important question, or any question of the character which Rule 35 of this Court indicates will be considered as a reason for granting a writ of certiorari; it is an isolated case governed by its own peculiar facts.

II.

The Court of Claims was correct in awarding a judgment for the respondent.

POINT I.

This case presents no public, special or important question, or any question of the character which Rule 35 of this Court indicates will be considered as a reason for granting a writ of certiorari; it is an isolated case governed by its own peculiar facts.

The only objection to the claim for refund is that it did not comply with the regulations of the Commissioner of Internal Revenue, in that it was *general* in its terms and did not mention the *specific* ground upon which the present suit is based.

This Court has already decided in *Tucker* v. *Alexander*, 275 U. S. 228, that the Commissioner of Internal Revenue may waive the insufficiency of a claim for refund. In that case, the taxpayer, *at the trial*, abandoned the grounds stated in its claim for refund and, indeed, those set forth in its complaint filed in the District Court. It rested its right to recover on an *entirely different* ground than any of those theretofore stated in the claim for refund or in the pleadings. The only difference between that case and the one at bar are the *facts* from which waiver is to be found.

If a waiver of the requirement of the regulations that "all the facts relied upon in support of the claim should be clearly set forth" (Rec. 62, Art. 1036) may be made *during the trial* and by a course of conduct there—as was the case in *Tucker* v. *Alexander*—it must necessarily follow that a waiver can be made *before suit is brought* and can be found to have been made by a course of conduct inconsistent with an intention to insist upon a compliance with the regulations. No reason can be conceived

why the validity of the exercise of the right to waive should be depended upon *when it is exercised, i. e., whether at the trial of an action or before a suit is brought.* This is more readily apparent when it is considered that the purpose of the statute and regulations, as stated by this Court in *Tucker* v. *Alexander*, was "for the convenience of government officials in passing upon claims for refund and preparing for trial."

This purpose was not only recognized by the Court of Claims but, together with the principle of waiver, was made the keystone of its decision (R., p. 15). There is, therefore, in this case no "important question of Federal law which has not been, but should be settled by this Court", nor has the Court of Claims "decided a Federal question in a way probably in conflict with the applicable decisions of this Court." Nor has it failed to give "proper effect to any applicable decision of this Court" or construed a statute which has not been authoritatively construed by this Court. These seem to be the only matters mentioned in Paragraph 5 of Rule 38, which are applicable to this case.

Turning now to the reasons advanced by the petitioner for asking a writ of certiorari, we find that it is first claimed that the Court of Claims was not justified in finding *"from the facts"* that the Court had waived any insufficiency in the claim for refund. We take it that this Court will not, except in very unusual cases, review the holdings of inferior courts *on questions of fact.*

It is next urged that the Court of Claims holds that "the taxpayer could sue on a basis not disclosed in its claim for refund, because it was known at the time the claim was filed that it was the Commissioner's policy to reject claims filed on such basis", and that such a hold-

ing is in conflict with the decisions of this Court in *Rand* v. *United States*, 249 U. S. 503, and *Rock Island A. & L. R. R. Co.* v. *United States*, 254 U. S. 141. In these cases, it was simply held that the statute required the filing of a claim for refund as a condition precedent to the bringing of a suit, and that, consequently, unless such a claim were filed, no suit could be brought. In the case at bar a claim was filed and this Court has held (*Tucker* v. *Alexander, supra*), that the *sufficiency* of such a claim under the regulations may be waived.

It is next urged that if there was no waiver, the Court below erred in awarding judgment to the respondent. The Court of Claims decision is in no way in conflict with that contention but, as it held there was a waiver the point is immaterial.

Finally, the petitioner contends that the decision of the Court of Claims, if allowed to stand, will result "in a multitude of claims for refund in general terms under which taxpayers may at any time raise new objections to taxes collected". The obvious answer to this contention is that when a claim in *general* terms is presented to the Commissioner of Internal Revenue, he may refuse to accept it because it does not comply with the regulations which require (Reg. 62, Art. 1036) that "all the facts relied upon in support of the claim should be clearly set forth under oath".

POINT II.

The Court of Claims was correct in awarding a judgment for the respondent.

The pertinent parts of the claim for refund were as follows (R., pp. 2, 10, 14):

> "The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess-profits tax assessed for this period.
>
> This claim is filed to protect *all possible legal rights* of the taxpayer, *pending*, and *at the date of*, the settlement of the claim for relief."

It will be noted that the respondent sought to cover by the claim "all possible legal rights" which it had *then pending*, as well as those which might exist if the Commissioner should determine that respondent was entitled to special relief under Section 210 of the Revenue Act of 1917. The Commissioner not only made no objection to the claim but, as before stated, acted thereon and a year later actually refunded to the respondent $17,050.55.

We submit that, the action of the Commissioner in (a) acting on the claim and making a refund thereunder and (b) failing to interpose any objection to the fact that it was insufficient under the regulations, constituted a waiver of his right to insist, after the time for filing a new one has expired, that the claim be more specific.

It will be borne in mind that the plaintiff is not seeking to recover on a ground different from that or those specified in the claim for refund, but is seeking to recover on a claim which was stated to be filed to protect "all

possible legal rights of the taxpayer'' *then pending* as well as those which might exist at the date of the settlement of its claim under Section 210. The only objection to the claim that there can be, is that it does not set forth "all the facts relied upon in support of the claim". In other words, that it is general rather than specific. But the fact that it was general and not specific was never objected to. As this Court said the statute and regulations pertaining to refunds were devised "not as traps for the unwary but for the convenience of government officials in passing upon claims for refund". If the generality of the claim in question was insufficient to enable the government officials to pass upon the claim, it was surely the duty of the Commissioner, instead of acting upon it, to ask for any further details that he might desire, or to require the plaintiff to make it as specific as possible.

Surely the failure of the Commissioner to object to the claim, coupled with his action in making a refund thereunder, was inconsistent with any intention to insist that it should be more specific; it was calculated, on the contrary, to induce a belief that there was an intention or purpose to waive any such requirement.

The case at bar presents much stronger reasons for applying the rule in respect to waiver than were present in *Tucker* v. *Alexander*. In that case, the plaintiff specified, not only in his claim for refund but in the complaint which he filed in court, certain grounds upon which he based his contention that he had paid more taxes than he should have paid, and it was not *until the trial* that he shifted his position and sought to recover on an *entirely different* ground, and presumably, an amount of money different than he would have been entitled to on the other

grounds. In the case at bar, the plaintiff presented a general claim to cover "all possible legal rights"; defendant made no objection to the generality but acted upon the claim, and now, when the time for filing a more specific claim has expired, he insists that the plaintiff is not entitled to recover an admitted overpayment of taxes, because the claim is not specific enough.

Moreover, as pointed out in the opinion of the Court of Claims, the failure to *specifically* claim a refund based on the failure to make a deduction for patent depreciation did not in any way prejudice the Commissioner, because it had been his settled policy to disallow any deduction for depreciation or exhaustion of patents, unless it was claimed in the *original* income tax returns, and it was not until long after the time for filing a claim for refund had expired that such policy of the Commissioner was reversed by the Board of Tax Appeals (*Union Metal Mfg. Co.*, 1 B. T. A. 295).

CONCLUSION.

It is therefore, respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS G. HAIGHT,
ROBERT H. MONTGOMERY,
J. MARVIN HAYNES,
Counsel for Respondent.

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CHARLES ELMORE CROPLEY

United States Supreme Court

October Term, 1930.

No. 116.

THE UNITED STATES,
Petitioner,

vs.

FELT & TARRANT MANUFACTURING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

THOMAS G. HAIGHT,
ROBERT H. MONTGOMERY,
J. MARVIN HAYNES,
Counsel for Respondent.

SUBJECT INDEX

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Statement of the Case ____ 1

Summary of Argument ____ 2

Argument:

I. This suit is resisted on a mere technicality, the failure to comply with which in no way interfered with the Commissioner in the discharge of his duties, or thwarted the purpose of the statute and regulations relied upon by the petitioner. Hence, every doubt should be resolved in favor of the respondent ____ 3

II. As the Commissioner did not object to the sufficiency of the claim for refund until after the time for filing an amended claim had expired, but actually made a refund thereunder, he should be held to have waived any insufficiency thereof under the regulations, especially in view of the preceding point ____ 4

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IN THE

United States Supreme Court

October Term, 1930.

No. 116.

THE UNITED STATES,
Petitioner,

vs.

FELT & TARRANT MANUFACTURING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

Statement of the Case.

Very little need be added to the statement of the case as set forth in petitioner's brief. It is conceded that respondent overpaid its 1917 income taxes to the extent of $26,909.50. Repayment is resisted upon the sole ground that the claim for refund is insufficient in that it fails to set forth the specific facts and ground upon which this suit is based. As will be seen from that portion of the claim which is quoted in petitioner's brief, it is general rather than specific. It states that it is filed "to protect *all possible* legal rights of the taxpayer, *pending*, and at the date of the settlement of the claim for relief."[1] The Commis-

[1] In petitioner's brief, the word "date" appears in parentheses and immediately follows the word "rate". The use of the latter word in the record at p. 10 is clearly a misprint. The wording of the claim is correctly quoted in the opinion of Chief Justice BOOTH at p. 14 of the record.

sioner of Internal Revenue interposed no objection to the form of the claim for refund,[2] but acted upon it and allowed it to the extent of approximately $17,000.[3] The failure of the claim for refund to set forth the specific facts on which the admitted overpayment is based, in no way misled the Commissioner or prevented him from passing upon the claim,[4] because, at the time the claim was filed and indeed until after the expiration of the time within which an amended claim for refund could have been filed, it was the settled policy of the Commissioner not to allow such deductions as respondent sought, the failure to allow which resulted in the overpayment. As the facts were stipulated, any insufficiency of the claim for refund has in no way hindered the petitioner in preparing for trial.

SUMMARY OF ARGUMENT.

I.

This suit is resisted on a mere technicality, the failure to comply with which in no way interfered with the Commissioner in the discharge of his duties, or thwarted the purpose of the statute and regulations relied upon by the petitioner. Hence, every doubt should be resolved in favor of the respondent.

II.

As the Commissioner did not object to the sufficiency of the claim for refund until after the time for filing an amended claim had expired, but actually made a refund thereunder, he should be held to have waived any insufficiency thereof under the regulations, especially in view of the preceding point.

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[2] R. p. 18.
[3] R. p. 12.
[4] R. p. 16.

ARGUMENT.

I.

THIS SUIT IS RESISTED ON A MERE TECHNICALITY, THE FAILURE TO COMPLY WITH WHICH IN NO WAY INTERFERED WITH THE COMMISSIONER IN THE DISCHARGE OF HIS DUTIES, OR THWARTED THE PURPOSE OF THE STATUTE AND REGULATIONS RELIED UPON BY THE PETITIONER. HENCE, EVERY DOUBT SHOULD BE RESOLVED IN FAVOR OF THE RESPONDENT.

The Government resists the payment of an admittedly just obligation upon the barest technicality, when a compliance with the technicality (the making of the claim for refund more specific), within the time limited by law, would not have changed the petitioner's position and, to that extent, would have been, as the Court of Claims said, "a useless and futile act". Respondent's claim is based upon the failure to allow a deduction from gross income for the year 1917 for exhaustion of certain patents. This deduction was not claimed in the original return. As pointed out in the opinion of the Court of Claims, and as admitted in petitioner's brief, it was the settled rule and policy of the Commissioner of Internal Revenue, at the time the claim for refund in the case at bar was filed, to refuse deductions from gross income on account of depreciation of patents, unless the deduction was specifically claimed in the original return for the year involved. This policy continued until the month of May, 1925, when the Commissioner acquiesced [5] in a decision of the Board of Tax Appeals which had been made in the January preceding,[6] to the effect that a taxpayer was entitled to an allowance for depreciation of patents, notwithstanding that no claim for deduction had been made in the original return. However, the respon-

[5] Internal Revenue Bulletin IV-25-19 p. 1.
[6] *Appeal of Union Metal Mfg. Co.*, 1 B. T. A. 395.

dent's time within which to file an amended claim for refund expired on April 1, 1925.[7]

Therefore, at the time the Commissioner changed his policy or rule, respondent could not have filed an amended claim.

This Court, in *Tucker* v. *Alexander*, 275 U. S. 228, stated that the statute requiring the filing of a claim for refund as a condition precedent to the institution of a suit to recover a tax illegally collected, and the regulations promulgated by virtue thereof, "are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial". Consequently, the purpose of the statute and regulations would not have been served or furthered in any way had the claim been made technically accurate.

II.

AS THE COMMISSIONER DID NOT OBJECT TO THE SUFFICIENCY OF THE CLAIM FOR REFUND UNTIL AFTER THE TIME FOR FILING AN AMENDED CLAIM HAD EXPIRED, BUT ACTUALLY MADE A REFUND THEREUNDER, HE SHOULD BE HELD TO HAVE WAIVED ANY INSUFFICIENCY THEREOF UNDER THE REGULATIONS, ESPECIALLY IN VIEW OF THE PRECEDING POINT.

The statute itself does not state what the claim for refund shall contain, but simply provides that a claim must be filed with the Commissioner "according * * * to the regulations of the Secretary of the Treasury".[8] The regulations in force when the claim in question was filed provided that the claim should be on a certain form and that, "All the facts

[7] The respondent, on February 2, 1923, filed a written waiver of its right to have the taxes for the year 1917 determined and assessed within five years after the return was filed (R. p. 11) and consequently, by virtue of Section 281 (e) of the Act of 1924, it was entitled to file a claim for refund on or before April 1, 1925.

[8] Sec. 1318 of the Revenue Act of 1921 amending Sec. 3226 of the Revised Statutes quoted in full on p. 15 of petitioner's brief.

relied upon in support of the claim should be clearly set forth under oath.'"[9] It will be noticed that the word "should" is used instead of the word "shall", which would seem to indicate that the Treasury Department considered it *preferable* that all the facts should be set forth rather than they *must necessarily* be set forth. The pertinent part of the claim for refund in this case is as follows:

> "The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess-profits tax assessed for this period.
>
> This claim is filed to protect *all possible legal rights* of the taxpayer, *pending*, and *at the date of*; the settlement of the claim for relief."

The claim was not intended to cover only such refunds as the respondent might be entitled to in the event that its claim for special relief should be granted, as petitioner's brief contends. This is manifest, we submit, from the language of the claim. It states that it is filed "to protect *all possible* legal rights of the taxpayer, *pending*, and at the date of, the settlement of the claim for relief." If it had been intended to limit the claim only to the rights which might arise in the event that plaintiff's claim for special relief should be granted, the conjunctive "and" would have been omitted, and the claim would have read that it was "to protect all legal rights pending at the date of the settlement of the claim for relief." The claim by its language sought to cover two different kinds of rights,—those which *were pending* at the time of the filing of the claim and also those which *might* exist in the event that the claim for special relief was granted. The latter kind, of course, could not arise until after the Commissioner had determined whether or not he would grant special relief. As was said in the opinion

[9] Art. 1036, Regulations 62, quoted on pp. 16-17 of petitioner's brief.

of the Court of Claims,[10] "By the use of such comprehensive terms it is to say the least perfectly apparent that the taxpayer notified the commissioner that all its legal rights would be insisted upon." The Commissioner could doubtless have objected to the claim because of its generality. He did not do so but, on the contrary, acted upon it and a year later actually refunded to the respondent $17,050.55.

This Court has decided in *Tucker* v. *Alexander, supra,* that the Commissioner of Internal Revenue may waive any insufficiency, under the regulations, of a claim for refund. In that case, the plaintiff specified, not only in his claim for refund, but in the complaint which he filed in court, certain grounds upon which he based his contention that he had paid more taxes than he should have paid, and it was not *until the trial* that he shifted his position and sought to recover on an *entirely different* ground, and presumably, an amount of money different than he would have been entitled to on the other grounds. If a waiver of the requirement of the regulations that "all the facts relied upon in support of the claim should be clearly set forth" * may be made *during the trial* and by a course of conduct there—it must necessarily follow that a waiver can be made *before suit is brought* and can be found to have been made by a course of conduct inconsistent with an intention to insist upon a compliance with the regulations. No reason can be conceived why the validity of the exercise of the right to waive should be depended upon *when it is exercised, i. e., whether at the trial of an action or before a suit is brought.* This is more readily apparent when it is considered that the purpose of the statute and regulations, as stated in *Tucker* v. *Alexander,* was "for the convenience of govern-

[10] R. p. 17.
* Rec. 62, Art. 1036.

ment officials in passing upon claims for refund and preparing for trial."

In the case at bar, it is our contention that the Commissioner, in (a) acting on the claim and making a refund thereunder, and (b) failing to interpose any objections to the fact that it was insufficient under the regulations, should be held to have waived his right to insist, after the time for filing a new claim has expired, that the claim should be more specific; especially in view of the before stated nonmandatory language of the regulations; and that any doubts on this point should be resolved in favor of the respondent, because of the extremely technical character of the sole defense to this suit.

It will be borne in mind that the respondent is not seeking to recover on a ground different from that or those specified in the claim for refund, but is seeking to recover on a claim which was stated to be filed to protect "*all possible legal* rights of the taxpayer" *then pending* as well as those which might exist at the date of the settlement of its claim for special relief. The only objection to the claim that there can be, is that it does not set forth "all the facts relied upon in support of the claim". In other words, that it is general rather than specific. It did not set forth *any* of the facts relied upon", either in respect to the claim for special relief or otherwise. But the fact that it was general and not specific was never objected to. If the generality of the claim was insufficient to enable the government officials to pass upon the claim, it was surely the duty of the Commissioner, instead of acting upon it, to ask for any further details that he might desire, or to require the respondent to make it as specific as possible.

Surely the failure of the Commissioner to object to the claim, coupled with his action in making a refund there-

under, was inconsistent with any intention to insist that it should be more specific; it was calculated, on the contrary, to induce a belief that there was an intention or purpose to waive any such requirement. Especially is this so, in view of the apparently directory rather than mandatory language of the regulation above referred to.

Several of the lower Courts have dealt with the question of waiver of the insufficiency of claims for refund. We will briefly analyze their decisions.

In *Union Trust Co.* v. *McCaughn*, 24 Fed. (2d) 459 (D. C. E. D. Pa.), the claim for refund did not include the claim made at the trial. It appeared, however, from the notice of the rejection of the claim, that that point had been considered by the Commissioner and rejected by him. Judge KIRKPATRICK, after pointing out that the object of the statute in requiring a claim for refund was to afford the Commissioner "an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto", said (p. 461):

> "If these objects have been attained, the statute has been sufficiently complied with, even though some of the grounds upon which the claim was made were not specifically set forth in the application. It is apparent from the letter of the Commissioner that he had before him the question now raised, and that he had full opportunity to reconsider and modify the ruling of his office, had he deemed the ruling erroneous. He also, of course, had the right to waive any defect or informality in the application for refund, and, in view of his letter, he will be held to have done so."

As before pointed out, the failure of the claim for refund in the case at bar to specifically set forth the ground upon

which this suit is based in no way affected the purposes sought to be accomplished by the statute.

In *Howbert* v. *Penrose*, 38 Fed. (2) 577, (C. C. A.—10th), the trial court had found for the defendant upon the ground that the claim for refund set forth no facts in connection with the loss growing out of the sale of certain stock, although it did set forth the facts in respect to losses on sales of other stocks. The *amount* specified in the claim for refund, which was quite general, included this loss and it was claimed in the income tax return, although not identified by name. Moreover, neither in an appeal to the Commissioner for relief against a proposed assessment, nor in a petition for rehearing, was this particular loss mentioned. The Circuit Court of Appeals held that the claim for refund, considered in the light of the appeal to the Commissioner and the petition for rehearing, was insufficient to "fairly advise the Government of the claim of the taxpayer for a refund" on the particular stock. In the complaint, plaintiff specifically set out his claim in respect to this particular stock, and alleged the filing of a claim for refund. The defendant admitted the filing of the claim, but did not make an issue of the sufficiency of the claim in respect to the particular stock. If he had done so, the plaintiff would have had time to amend the claim. When the point was raised at the trial, the period of limitation had expired. The Court, after referring to the statement of Justice HOLMES[11] that "men must turn square corners when they deal with the Government" said that the Government also "ought to turn square corners when dealing with its citizens". It also said (p. 581):

> "There is another maxim applicable in both of these appeals, and that is that substance should be given the right of way over form. (Citing cases.)

[11] *Rock Island R. R. Co.* v. *U. S.*, 254 U. S. 141.

> The claim for refund should have been more particular; but if the defendant expected to avoid the repayment of this illegally collected tax on that account, he should have been more particular in his answer. The derelictions of the parties are about equal, and if the matter is at large, the tax ought to be repaid, for concededly the government has no right to it."

In *Lehigh & Wilkes Barre Coal Co.* v. *United States,* 38 Fed. (2) 637 (D. C. M. D. Pa.), a defense was interposed in a suit to recover an overpayment of taxes that the claim for refund "did not specify the ground for the refund of taxes paid". Judge JOHNSON said that it was a sufficient answer to this position that it was impossible for the petitioner to specify the ground for refund because his return had not yet been audited when the claim was filed, or within the period of the statute of limitations. He further said (p. 639):

> "Furthermore, the Commissioner of Internal Revenue made no objection to the form of petitioner's claim filed February 10, 1925; *this the court considers important in this case.*
>
> Regardless of any defect of form or sufficiency in the original claim for refund the delay of the Commissioner of Internal Revenue to audit the petitioner's return within the period of the statute of limitations, and the impossibility on the part of the petitioner to file a more specific claim within the period of the statute of limitations, and the fact that no objection was made to the form of the petitioner's original claim for refund, *which amounts to a waiver of any irregularity,* and the subsequent amendment, specifying the grounds of petitioner's claim for a refund prior to the final rejection, made the claim effective (citing cases)."

Two decisions on this point were rendered by Judge HAZEL in the Western District of New York at about the same time (*Zeller* v. *United States,* 35 Fed. (2) 870, and *Art Metal Construction Company* v. *United States;* 35 Fed. (2) 379).

In the first of these suits, the claim for refund was for $1 or any sum which, by reason of "future court cases, treasury rulings or for other reasons, it may appear has been illegally or erroneously assessed or collected." And it was also stated in the claim that a claim for special assessment would be submitted later. In that case, as in the case at bar, the Government conceded that the tax was erroneous but resisted the suit upon the ground that the claim for refund was insufficient. In that case, as in this, the Commissioner, without objecting to the claim, had actually made a refund of part of the overpayment.

In the *Art Metal Construction Company* case, the claim for refund was apparently just as general as in the *Zeller* case. In this case, the plaintiff sought a refund to which it was admittedly entitled growing out of a decision of the Board of Tax Appeals in respect to special relief under the 1918 Act. The Commissioner declined to refund the amount to which the plaintiff was entitled under the special assessment decision because "the original claim for refund did not specifically ask for special assessment * * * the claim was barred by the statute of limitations." It was held, as it was in the *Zeller* case, that the Commissioner had waived the informality of the claim for refund. These cases recognized and applied the principle that the Commissioner may waive the requirements of the regulations that "all the facts relied upon in support of the claim should be clearly set forth under oath." It is true that in both of these cases, Judge HAZEL felt that the Commissioner had been fully

apprised *during the course of the proceedings before him* of the claim which the plaintiff was making and which was subsequently the subject matter of the suits.

As before stated, and as found by the Court of Claims, in the case at bar, it would have served no purpose to have apprised the Commissioner in the claim for refund of the specific facts upon which the present suit is based. Consequently, the situation in this case would seem to be no different than in the cases before Judge HAZEL. Moreover, it would seem to be immaterial whether the Commissioner is apprised, *during the course of the proceedings in his department*, of the ground upon which a suit is subsequently brought, if the ground is not set forth in the claim for refund. The regulations provide for the *filing* of a claim for refund which shall be specific as to the facts relied upon.

In *Taylor Lockwood Company* v. *United States* (Court of Claims, Dec. 8, 1930—Commerce Clearing House 1930 Service—Sec. 9737), the Court of Claims explained its decision in the case at bar, saying:

> "The language of the claim in that case was that 'This claim is filed to protect all possible legal rights of the taxpayer pending, and at the date of, the settlement of the claim for relief', and the court pointed out that 'by the use of such comprehensive terms it is, to say the least, perfectly apparent that the taxpayer notified the commissioner that all its legal rights would be insisted upon'. The commissioner received the refund claim, acted upon it as it was, granted a refund, without any complaint as to its generality in any respect at the hearing thereon, and no exceptions were taken as to its consideration at that time."

It is noteworthy of remark that in none of these cases, so far as the reports show, has an appeal been taken by the Government, although in each the ultimate decision was against it.

In *Arizona Commercial Mining Co.* v. *Casey,* 32 Fed. (2) 288 (which is briefly digested in petitioner's brief), the sole ground upon which the claim of waiver was predicated was that when the case was before an auditor, to whom it had been referred, the defendant stated in its brief that one of the issues of fact before the auditor was whether, and to what extent, the plaintiff was entitled to an additional deduction for depletion, this being the ground, asserted in the suit, which was not set forth in the claim for refund. One of the defendant's requests for findings filed with the auditor was that the "plaintiff produced no evidence that any claim for refund was filed with the Commissioner of Internal Revenue". Judge BREWSTER, speaking for the Court said (p. 291):

> "Inasmuch as the plaintiff claimed that it had duly filed with the collector of internal revenue at Boston a claim for a refund of the entire additional tax, it would be proper, if not necessary, for the auditor to make an alternative finding respecting the right of the plaintiff to a further deduction for depletion. To submit a brief on that issue was in no way inconsistent with the defendant's objection that the plaintiff had failed to comply with the statutory requirements. The facts disclosed on the record before me are clearly distinguishable from those confronting the court in *Tucker* v. *Alexander, supra.*"
>
> * * * * * * *
>
> "In the case at bar, the question of the sufficiency of the claim was raised in the pleadings and at the hearing before the auditor, and moreover the time

within which claims for refund could be filed had expired long before the defendant filed his brief with the auditor."

* * * * * * * *

"I find and rule on this aspect of the case that the defendant did not, by his course of conduct, waive compliance with the statute and regulations."

Consequently, this case cannot be considered as in any way opposed to the respondent's contention in the case at bar. There, the defendant at all times insisted upon the insufficiency of the claim for refund, admitting simply that the matter of depletion was an alternative issue before the auditor, in the event that the claim should be held to be sufficient.

CONCLUSION.

The respondent filed a claim for refund broad enough in terms and large enough in amount to include the specific claim now in suit, and thus complied with the statutory requirements. The Commissioner did not object to the generality of the claim but, on the contrary, acted upon and made a refund thereunder. If the claim had been specific as to the point now sued upon, it would have served no useful purpose, because it was the settled rule and policy of the Commissioner to refuse deductions for patent exhaustion when not claimed in the original return. The Commissioner has been in no way inconvenienced in preparing for trial, because the amount sued for is admittedly due if the claim for refund is sufficient.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

THOMAS G. HAIGHT,
ROBERT H. MONTGOMERY,
J. MARVIN HAYNES,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 116.—October Term, 1930.

The United States, Petitioner,
vs.
Felt & Tarrant Mfg. Co.

On Writ of Certiorari to the Court of Claims.

[April 13, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

This Court granted certiorari, 281 U. S. 719, to review a judgment of the Court of Claims, allowing recovery by respondent of income and excess profits taxes alleged to have been illegally exacted for the year 1917. 37 F. (2d) 977. It is conceded that respondent was entitled to a deduction from gross income for that year on account of exhaustion or obsolescence of patents, under § 203 of the Revenue Act of March 3, 1917, 39 Stat. 1001; §§ 4 and 206 of the Act of October 3, 1917, 40 Stat. 302, 305; § 12 (a) of the Act of 1916, 39 Stat. 767, which, if allowed, would result in the refund demanded.

The sole objection to recovery urged by the government is that the claim for refund filed by petitioner as a prerequisite to suit did not comply with § 1318 of the Revenue Act of 1921, 42 Stat. 314, and Article 1036 of Treasury Regulations 62, under that Act.

Section 1318 provides that "no suit . . . . shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been . . . illegally . . . collected . . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury. . . ." Article 1036, Treasury Regulations 62, provides that claim for refund shall be made on Form 843 and that "all the facts relied upon in support of the claim should be clearly set forth under oath."

Respondent filed an application under oath for reduction of its 1917 tax liability and for a corresponding return of taxes paid,

on Form 843, which it designated a claim "for refund of taxes illegally collected." But the sole ground stated for the demanded reduction of tax was that ~~petitioner~~ respondent had filed with the Commissioner an application for special relief from the amount of its excess profits tax under § 210 of the Act of 1917, 40 Stat. 307.[1]

That section provides for a special method of assessment of excess profits taxes in any case where the Secretary of the Treasury is unable satisfactorily to determine the invested capital of the taxpayer. It has no relation to deductions from gross income on account of exhaustion or obsolescence of patents. In support of its claim, which was ultimately allowed in part, respondent prepared and filed a brief, and an oral argument was held in the office of the Commissioner; but neither in its claim for refund, its brief, nor at the hearing, was mention made of the deduction now claimed.

The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant, whether the collector or the United States. *Tucker* v. *Alexander*, 275 U. S. 228; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 353, 354; *Kings County Savings Institution* v. *Blair*, 116 U. S. 200; *Nichols* v. *United States*, 7 Wall. 122, 130.

One object of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue, *Nichols* v. *United States, supra*, p. 130, a purpose not accomplished with respect to the present demand by the bare declaration in respondent's claim

[1]The material part of the claim for refund is as follows:

"The taxpayer has filed with the commissioner a claim for special relief under section 210 of the 1917 revenue act for the excess profits tax assessed for this period.

"This claim is filed to protect all possible legal rights of the taxpayer, pending, and at the rate of, the settlement of the claim for relief. Computation has been made as follows:

Total profits taxes paid	$227,789.38
Less: Decrease in income taxes on account of profits taxes credit	13,667.37
Refund claimed	$214,122.01

"The taxpayer requests an oral hearing and the right of appeal in the event of an adverse decision on the part of the unit and before any formal rejection of the claim is made."

that it was filed "to protect all possible legal rights of the taxpayer". The claim for refund, which § 1318 makes prerequisite to suit, obviously relates to the claim which may be asserted by the suit. Hence, quite apart from the provisions of the Regulation, the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded.

The Court of Claims, in allowing recovery, relied upon *Tucker* v. *Alexander, supra,* and upon the fact that at the time when petitioner filed its return and its claim for refund, the Treasury had consistently refused to allow deductions from gross income for exhaustion of patents. Consequently it held that the filing of a demand which was certain to be refused was a futile and unnecessary act. But in *Tucker* v. *Alexander* the right of the government to insist upon compliance with the statutory requirement was emphasized. Only because that right was recognized was it necessary to decide whether it could be waived. The Court held that it could, and that in that case it had been waived by the stipulation of the collector filed in court. Here there was no compliance with the statute nor was there a waiver of its condition, since the Commissioner had no knowledge of the claim and took no action with respect to it.

The necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected. It is the rejection which makes the suit necessary. An anticipated rejection of the claim, which the statute contemplates, is not a ground for suspending its operation. Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and "they mark the conditions of the claimant's right." *Rock Island R. R. Co.* v. *United States,* 254 U. S. 141, 143. Compliance may be dispensed with by waiver, as an administrative act, *Tucker* v. *Alexander, supra;* but it is not within the judicial province to read out of the statute the requirement of its words. *Rand* v. *United States,* 249 U. S. 503, 510.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.